IN THE HIGH COURT OF JUDICATURE OF BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 8276 of 2005

Francis D'Souza .. Petitioner

versus

Khimji Vidhubhai Shah (since deceased thorugh his Lrs(1a) to 1(c) .. Respondents

...

Mr.S.A. Pawar for the petitioner.

Mr.Hiralal Thakkar, Sr.Counsel i/b K.D. Shah for respondent nos.1(a) to 1(c).

CORAM : D.G.KARNIK, J

DATED : 29th June 2007.

P.C.:

1. Heard learned counsel for the parties.

2. By this Writ Petition, the petitioner challenges the order dated 30th June 2005 passed by the appellate bench of the Small Causes Court, Mumbai declining to condone delay in making an application for setting aside the abatement of an appeal and declining to set aside the abatement.

3. The original respondent, who was the landlord of the premises, died on 1st March 2001 during the pendency of an appeal filed before the appellate bench of the Small Causes Court, Mumbai. An application for bringing the heirs of the deceased landlord on record was not made within the statutory period of 90 days nor an application for setting aside the abatement was made within the statutory period of further 60 days. A composite application, for setting aside the abatement and bringing the heirs of the deceased respondent on record was made on 5th August 2002 i.e. after more than 17 months of the death. By the impugned order, the appellate bench held that sufficient cause had not been shown for condonation of delay for setting aside the abatement and has dismissed the same.

4. Learned counsel for the appellant submitted that the petitioner was not aware of the death and therefore the application could not be made in time. He also submitted that even after the petitioner became aware of the death he could not make the application as he did not know the names of the heirs of the deceased landlord.

5. Counsel further submitted that petitioner became aware of the death of the original respondent only on 2nd July 2002 and application was made promptly on 5th August 2002 and therefore there was no undue delay on the part of the petitioner. In paragraph no.3 of the affidavit in support of the application, the petitioner himself has stated as follows :-

> "I say that death of the respondent (original plaintiff) came to my knowledge only when the bailiff of this High Court want to serve the process of this Hon'ble Court on 19th January 2002.

Thus the oral submission made on behalf of the petitioner that the petitioner became aware of the death only on 2nd August 2002 is not correct even as per the petitioner's own affidavit.

6. As regards the contention that petitioner was not aware of the names of heirs of landlord, the

contention is unbelievable. The petitioner has given the address of the original respondent as Building no.2, Ranade Road, Dadar. The address of the proposed heirs is also mentioned as "Building no.2, Ranade Road, Dadar indicating that the heirs of the deceased landlord were living with him or in the same building. In the circumstances, mere ipsi dixit of the petitioner that he did not know the names of the heirs of the deceased cannot be accepted. The appellate court bench has rightly not believed the same.

6. Learned counsel for the petitioner then submitted that on account of the death of the petitioner, he had gone to the native place to sort out the family dispute which had arisen after the demise of the mother. Particulars of when he went to the native place and when he returned are not mentioned in the petition. It was necessary for the petitioner to give all those details if his case was to be considered and evaluated in that regard.

7. It may be noted that the petitioner is not in possession of the suit premises since long. When decree was sought to be executed a third party was found to be in possession who raised an obstruction

for execution of the decree. Counsel for the respondent submits that on their application, the obstruction has been removed and possession has already been recovered by the respondent. In my view, the dispute is stale and merely an attempt on the part of the tenant who was not in possession when the decree was executed to regain the possession for collateral reasons.

8. Petition is accordingly rejected summarily.

(D.G. KARNIK, J)